

THE ESTATE OF STAN PAUKAN

IBLA 96-392

Decided November 2, 1998

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request to amend Native allotment application F-18532, Parcel B.

Reversed and remanded.

1. Administrative Authority: Generally--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Rules of Practice: Appeals: Standing to Appeal

Under section 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1994), a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. A BLM decision denying a request by the estate of a Native allotment applicant to amend the land description contained in the application will be reversed when the case record clearly shows that the amendment describes the land originally intended to be claimed by the applicant.

APPEARANCES: Timothy E. Troll, Esq., Dillingham, Alaska, for Appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; John L. Steiner, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska, for the State of Alaska.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Estate of Stan Paukan has appealed from an April 16, 1996, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting a proposed amendment of Paukan's Native allotment application, F-18532, Parcel B. The Estate claims that the land Paukan originally intended to claim is located within lands conveyed to the State of Alaska (U.S. Survey (U.S.S.) No. 4101) in 1971 by patent No. 50-71-0037 for airport purposes.

In rejecting the proposed amendment, BLM stated that the proposed amendment "substitutes new lands rather than corrects an error in the description in Mr. Paukan's application." (Decision at 4.)

The case record contains three Native allotment applications, each dated April 29, 1971, and each signed by Stan Paukan. All claim use and occupancy from 1965. One application is handwritten (the "handwritten application"), and it states that it is for "2 parcels 160 acres, see sketch." The attached sketch shows two parcels, one located on the Andreafsky River and the other located on the Yukon River within the area covered by U.S.S. No. 4101. ^{1/} Nearly a year later, on April 11, 1972, BIA sent a letter to Paukan stating:

We are filing your application for the 80-acre tract up Andreafsky River.

However, the tract you described on the Yukon, west of Pitka's Point, has been surveyed and patent issued to the State of Alaska.

Enclosed is a copy of the map. If you have used another tract of land further down the Yukon, please mark the map to show the location. We will then add the tract to your application.

The case file contains a copy of a map bearing a sketch of U.S.S. No. 4101 and the outlines of a parcel of land adjacent to and downriver from the survey boundary. At the bottom of the map a handwritten statement signed by Stan Paukan: "Plot adjacent to state patent is where I want the 80 acre. Be advised that I had stay [sic] on this land state surveyed, before the state came to survey it."

As BIA had promised in the April 11, 1972, letter to Paukan, it submitted a typewritten application (the "first application") to BLM on April 21, 1972, for the land on the Andreafsky River. That first application, signed by Paukan and dated April 29, 1971, described only the Andreafsky River tract of land and did not designate it as Parcel A or Parcel B.

Thereafter, on June 5, 1972, BLM received from BIA another typewritten application (the "second application") signed by Paukan, and dated

^{1/} The application in the case file is a copy of the original handwritten application filed with the Bureau of Indian Affairs (BIA) on Aug. 11, 1971.

The original handwritten application was found in BIA's files on Oct. 10, 1984, by Karen J. Honey, BIA realty specialist, Bethel Agency, Bethel, Alaska, who forwarded a copy to BLM, where it was received on Oct. 16, 1984. (Affidavit of Karen J. Honey, dated Oct. 10, 1984.) On the sketch the Andreafsky River parcel is designated as Parcel B and the Yukon River parcel as Parcel A.

April 29, 1971. A memorandum from BIA, accompanying that application, stated that it was the "Corrected Native allotment application and evidence of Occupancy for Stan Paukan of St. Marys. The prior filing did not include Parcel B." That application contains a description of the Andreafsky River tract and designates it as Parcel A. It also contains a description of 80 acres of land on the Yukon River downriver and adjacent to U.S.S. No. 4101. That land is designated as Parcel B on the application.

Stan Paukan died on December 7, 1978. On August 20, 1980, Stan Paukan's wife, Flora, accompanied a BLM realty specialist on a field examination of Parcel B. At that time, she showed him a site 1 mile upstream from that described on the second application. Accompanying the field report was a handwritten statement signed by Flora Paukan, and dated August 20, 1980, stating: "The correct location of my husband's Native allotment parcel is one mile westerly along the Yukon River shoreline to where the 16 fish camp buildings are located near the end of the airport road. The 80 acre parcel is all part of the U.S. Survey 4101, the airport survey." ^{2/} The BLM realty specialist found significant evidence of use and occupancy of the site. However, he recommended in his report that "[t]he rights of the allotment applicant should be determined through witness statements in order to determine if any conflict exists with the airport land patent to the State of Alaska." (Field Report at 7.) The BLM realty specialist did not examine the land described in the second application.

In a September 23, 1985, memorandum to the Alaska State Office, Chief, Native Allotment Section, the McGrath Resource Area Manager stated that a BLM realty specialist had undertaken a supplemental field examination of F-18532, Parcel B. The Area Manager stated:

[H]e was assisted in the exam by Mr. Moses Paukan, Mayor of St. Mary's and the deceased applicant's older brother. Mr. M. Paukan confirmed the location of the allotment and is in the process of submitting a statement verifying use [of] same. The statement will also contain the dates his brother starting using the area for his fish camp. The attached photos reflect the same buildings and structures that Cliff Ellis, McGrath Resource Area Realty Specialist, documented in his August 20, 1980, field exam of this parcel.

In a memorandum dated September 25, 1985, the Acting Chief, Native Allotment Section, requested a survey of F-18532, Parcel B. Thereafter, BLM conducted a survey of Parcel B, and in a July 25, 1988, memorandum from

^{2/} Affidavits in the case file date Paukan's commencement of use and occupancy of Parcel B from June 1961. This is important because the State asserts that the land in question was withdrawn on Aug. 23, 1962, when it filed its application for the land under section 16 of the Federal Airport Act of May 13, 1946, 60 Stat. 179.

the Chief, Branch of Calista Adjudication, forwarding the case file to the Regional Solicitor, Alaska Region, "for your review and concurrence," the Chief stated that "[b]ased on evidence in the subject's file, we conclude that this Native allotment application, F-18532 Parcel B, located * * * within U.S. Survey No. 4101, and further identified as Alaska State Land Survey No. 86-3 containing 79.98 acres, is valid." The Office of the Regional Solicitor concurred on August 11, 1988.

By letter dated August 24, 1988, the Chief, Branch of Calista Adjudication, informed the State of Alaska that in accordance with the stipulated procedures for implementation of the Order in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), BLM had reviewed F-18532, Parcel B, and determined (1) the application to be valid; (2) the application to be a superior interest to the lands described therein; and (3) the land to have been erroneously conveyed to the State by Patent No. 50-71-0037, dated January 25, 1971. He stated that the lands in Parcel B should be reconveyed to the United States.

On January 27, 1989, BLM received a response from the State declining to reconvey the land and asserting that Paukan's application for Parcel B should be rejected. Thereafter, for several years the State and counsel for the Estate filed additional information with BLM in support of their respective positions regarding the use and occupancy of the lands included in Parcel B, as defined by Alaska State Land Survey No. 86-3. In addition, there were several unsuccessful attempts at settling the matter.

Then, despite the fact that from 1980 to 1992 BLM had accepted the fact that Stan Paukan claimed land within U.S.S. No. 4101 as Parcel B of F-18532, it issued a notice on December 22, 1992, stating that "an amended land description for Native allotment application F-18532 of Stan Paukan has been proposed" from the location set forth in the second application to the location as described in Alaska State Land Survey No. 86-3. That notice, issued pursuant to section 905(c) of the Alaska National Interest Lands Conservation Act of December 2, 1980 (ANILCA), 43 U.S.C. § 1634 (1994), provided interested parties with the opportunity to file a protest within 60 days of the date of the notice. On February 23, 1993, BLM issued a notice vacating its December 22, 1992, notice "in its entirety." Later, on January 20, 1994, it issued another notice proposing the same amendment set forth in its December 22, 1992, notice, again offering the opportunity to protest. 3/

3/ Prior to the expiration of that protest period, BLM issued a notice, dated Feb. 17, 1994, providing the Estate with 60 days to object to the conformance of F-18532, Parcel B, to Alaska State Survey No. 86-3. That same notice provided the State with 30 days to object. On Apr. 21, 1994, Flora Paukan responded that the Alaska State Survey No. 86-3 correctly represented her husband's Native allotment application F-18532, Parcel B. Thereafter, each of Paukan's heirs provided similar statements to BLM.

On April 11, 1994, the State filed a protest to the proposed amendment of Parcel B. On April 16, 1996, BLM issued the decision presently under appeal to this Board stating that "[t]he preponderance of the evidence supports the conclusion that the heirs' proposed amendment substitutes new lands rather than corrects an error in the description in Mr. Paukan's application" and that "[t]he second application is controlling as a matter of law." (Decision at 4.) In that decision, BLM made no attempt to explain its 1988 finding, in which the Office of the Regional Solicitor concurred, that Stan Paukan's Native allotment application F-18532, Parcel B, covered land within U.S.S. No. 4101, identified as Alaska State Land Survey No. 86-3, and was valid.

On appeal, the Estate argues that Stan Paukan's handwritten application is controlling and that he originally intended to apply for the lands within the airport survey. Both BLM and the State assert that the second application is the proper application. They each claim that Paukan's intent is clearly expressed in his statement, quoted above, that "[p]lot adjacent to the state patent is where I want the 80 acres." The State questions the heirs' action in "[s]econd-guessing their father's wise intent to designate land" outside the airport survey. (State's Response at 1.)

[1] It is now well established that section 905(c) of ANILCA was intended to permit only the amendment of an allotment application so that it would accurately reflect the land that the applicant originally intended to claim, but that was misdescribed through some error in the application.

Amendment to permit the substitution of new or additional land which the applicant had not originally intended to claim was not authorized. Heirs of Alice Byayuk, 136 IBLA 132, 137 (1996); Heirs of Edward Peter, 122 IBLA 109, 116-17 (1992); State of Alaska, 119 IBLA 260, 266-67 (1991); Mitchell Allen, 117 IBLA 330, 337 (1991).

Although BLM held that Stan Paukan's second application was controlling as a matter of law as to his intent, the facts of this case do not support such a holding by BLM. We conclude that Stan Paukan's handwritten application is the controlling application, and that the Estate properly sought to amend the second application to reflect the land Stan Paukan originally intended to claim in his handwritten application.

On appeal, both BLM and the State dismiss the handwritten application out of hand as not being certified by BIA. Nevertheless, the chronological sequence of events in this case makes clear that Paukan's handwritten application most clearly reflects his intent regarding the lands he sought to claim as a Native allotment.

Each of the three applications discussed above was dated April 29, 1971, and signed by Stan Paukan. It is obvious that Paukan completed one of those applications and provided a sketch showing the two parcels of land he desired, one on the Andreafsky River and one on the Yukon River. The other two applications were apparently signed and dated in blank by Paukan and submitted to BIA, who later utilized them in filing the first and second applications.

Following review of Paukan's handwritten application, BIA determined that there was no problem with his claim for the land on the Andreafsky River, and on April 21, 1972, it filed the first application with BLM, using one of the blank applications, by providing a typewritten description of that land. However, it identified a conflict for the land Paukan sought on the Yukon River because it was located within U.S.S. No. 4101. BIA notified Paukan of the conflict and advised him to claim other land in substitution for the land within that survey. In response to that notice, Paukan provided the statement that both BLM and the State consider to be binding as to his intent. However, they both ignore the remainder of that statement: "Be advised that I had stay [sic] on this land state surveyed, before the state came to survey it." Thus, the record is clear that the only reason Paukan provided a new description of land on the Yukon River adjacent to the boundary of the airport survey was because he was induced to do so by BIA.

Despite the State's contention that Paukan never drafted a qualifying application for land within U.S.S. No. 4101, "and, based on his own writing, did not intend to apply" for that land (State's Response at 1), the Estate points to a number of documents that it provided to BLM in August 1994, which it claims support a finding that Stan Paukan intended to claim the land identified in his handwritten application.

In a June 17, 1975, memorandum, the Supervisor, Airport Operations, requested that an individual in St. Mary's investigate unauthorized use of St. Mary's airport property. He stated: "[W]e have received word that a Mr. Paukan has a fish camp on airport property in St. Mary's." The bottom half of that memorandum contains a handwritten note, signed by Stan Paukan, stating:

The question on the Fish Camp at the Landing, called landing has been a fish camp before airport ever was built and surveyed.

Mr. Paukan has to this date been fishing and living at summer seasons for the last 14 years. The old stakes can't be found where the site is located however the land in question is not patent w/BLM or the State.

(Statement of Reasons for Appeal (SOR), Ex. 8.)

In a letter dated February 7, 1976, Stan Paukan responded to inquiries by the State of Alaska, Department of Public Works, Division of Aviation, regarding use of land within U.S.S. No. 4101. Paukan stated:

This portion of land that I claim and occupy is where my ancestors [sic] lived. It is no longer attended year round because of distance of nearest school. There are no longer houses because they were moved. I and members of my family have used the land as our subsistence [sic] and commercial fishing camp. With the ownership of the land and claimed I have given Mr. Randy Crawford permission to operate fish processing plant in 1975 and thereafter.

The Bureau of Land Management ssurveyed [sic] the Division of Aviation land without prior knowledge as to who occupied and occupy the land. It is important to me and members of my family that we claim it as our private property.

I cannot see how my fish camp is interfering with air traffic, as it is approxmitly [sic] 1 1/4 miles distance, approxmitly [sic] 1 1/4 miles west of aircraft approach and the airstrip being approxmitly [sic] 310 above sea level.

(SOR, Ex. 9 (emphasis added).)

Stan Paukan again wrote to the Division of Aviation on May 18, 1976, stating:

Alaska Native Allotment Application Serial Number F-18532 was originally [sic] applied on the land that my fish camp is at now. I was told by BLM that I had to sign on the application other wise I would loose [sic] my Native Allotment, before the dead line of the application expired.

I cannot in good conscience give way to Division of Aviation to the land in question. I have stated to you that the BLM surveyed the land without notifying us. The land is where our fore fathers lived and is also a buriel [sic] site for the residents of the forefathers who lived there. The name of the place is Ellnurmute. [4/]

Agian [sic] I want to ask you, the comings and goings of the aircrafts, are they in anyway hampered by the presence of our fish camp? I cannot see what value my property is [to] the Division of Aviation.

(SOR, Ex. 10.)

These letters demonstrate that the heirs, in seeking an amendment of the second application, are hardly "second-guessing their father's wise intent," as asserted by the State. Rather, they are seeking to correct the Parcel B description in the second application, which did not accurately reflect the land originally claimed by Stan Paukan in his handwritten application.

4/ The Native Allotment Field Report for F-18532, Parcel B, prepared by BLM following the Aug. 20, 1980, field examination identified an "[o]ld village site of housepits and several graves in grassy clearing behind present buildings of fish camp and alongside bulldozed gravel dump site." (Field Report at 4.) The BLM realty specialist who prepared the report noted that the "[n]ame of the site was 'Ellqurmiut' according to Flora Paukan." Id.

The Estate also points to a January 24, 1992, letter from one Paul Dixon to counsel for the Estate, which it claims establishes the existence of Stan Paukan's fish camp within the boundaries of U.S.S. No. 4101. In that letter Dixon recounted a visit to St. Mary's during his time as an employee of the Division of Aviation:

Our basic work completed, Stan Paukan asked me to go down river to his fish camp. He wanted me to see the place and give him some advice as to how to deal with the contractor[']s use of the area and its impact on their fishing. I found the campsite on the North bank of the Yukon River within the South approach zone to the airport runway. Adjacent, were fuel tanks, a pipe line running uphill to the runway and a very embryonic rough truck trail running from riverbank uphill to the runway. I was surprised to note that the elevation of the runway was a good 200 or more feet above the riverbank campsite so that the true hazard possibility, and thus need for clear zone protection, was greatly exaggerated. Obviously, the primary reason it was included in the airport land description was because on paper the land differential did not show up, it was public land available, and no note was taken of any use and occupancy. I do not believe anybody gave any thought to Native use of lands as "use and occupancy" in the BLM legal sense.

(SOR, Ex. 11 at 2-3.)

Dixon also stated that his visit was during the spring and that Stan Paukan had told him that the Paukan family had used the site for a number of years. He explained that Stan Paukan's concern was with the contractor building a rock/gravel/earth ramp out into the river to facilitate the unloading of equipment and that he feared it would interfere with the fish runs. "I estimate this visit occurred about 1961 or 1962 or about one year before the St. Mary's Airport was operational." Id. at 3.

This evidence, undiscussed in BLM's April 16, 1996, decision, leaves little doubt regarding Stan Paukan's intent. His handwritten application describes the land he originally intended to claim. His Estate seeks to amend the second application filed by BIA to reflect correctly his intent regarding the land claimed on the Yukon River. This it may do. 5/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed and the case is remanded for further proceedings

5/ The Estate argues that BLM should be estopped from asserting that the second application is controlling based on BIA's written representation to Paukan that the site of his fish camp had been patented to the State and that he should select other land. We need not address that argument because the evidence supports the Estate's right to amend the second application.

consistent with the stipulated procedures to implement the decision in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), approved by the District Court for Alaska on February 9, 1983.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge